

IP 06-0141-M 1 KPF USA v Smith
Magistrate Kennard P. Foster

Signed on 06/12/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	CAUSE NO. IP 06-141M-01
STEVEN M. SMITH,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	CAUSE NO. IP 06-141M-01
STEVEN M. SMITH,)	
)	
Defendant.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

STEVEN SMITH is charged in a complaint that was filed on May 16, 2006, with the unlawful possession of firearms by a convicted felon in violation of 18 U.S.C. § 922(g)(1) and the unlawful receipt, possession, or sale of stolen firearms in violation of 18 U.S.C. § 922(j). On May 23, 2006, at the initial appearance, the government moved for detention pursuant to 18 U.S.C. § 3142 (f)(1)(D) on the grounds that Defendant has been convicted of two crimes of violence.

Preliminary and detention hearings were held on May 26, 2006. The United States appeared by Assistant United States Attorney James P. Hanlon. STEVEN SMITH appeared in person and by his counsel, James McKinley. The Court found probable cause and held Defendant to answer. Based on the evidence adduced at the hearing, the government asserted the following additional grounds for the detention hearing: (1) this case involves a crime of violence under 18 U.S.C. § 3142(f)(1)(A); and (2) this case involves a serious risk that Defendant will threaten, injure, or intimidate a prospective witness under 18 U.S.C.

§ 3142(f)(2)(B). The Court found all three of the bases for detention asserted by the government to exist. The government established by clear and convincing evidence, predicated upon the facts set forth in the complaint and affidavit and Defendant's criminal history and record, that no condition or combination of conditions will reasonably assure the safety of the community if he is released. The government also established by a preponderance of the evidence that there is no condition or combination of conditions that would reasonably assure Defendant's appearance. The Court ordered that Defendant be detained.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

1. STEVEN SMITH is charged by a criminal complaint that was filed on May 16, 2006. The complaint is supported by the Affidavit of Eric Jensen, a Special Agent with the United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). The complaint charges Defendant with the unlawful possession of firearms by a convicted felon in violation of 18 U.S.C. § 922(g)(1) and the unlawful receipt, possession, or sale of stolen firearms in violation of 18 U.S.C. § 922(j).

2. The maximum penalties for violating 18 U.S.C. § 922(g)(1) and (j) include 10 years' incarceration, 3 years of supervised release, and a fine of \$250,000.

3. The Court takes judicial notice of the complaint and the Affidavit in support of the Complaint. The Court further incorporates the evidence admitted during the detention hearing, as if set forth herein.

4. The government submitted the matter of probable cause on the complaint and affidavit. Counsel for Defendant cross-examined Special Agent Jensen. The Court found probable cause and held Defendant to answer the charges set forth in the complaint.

5. The Court admitted as Exhibit 1 the Pre-Trial Services Report prepared by the U.S. Probation Office on the issue of Defendant's release or detention. Neither party objected to the admission of Exhibit 1.

6. The government submitted the issue of detention on the complaint and attached affidavit, Exhibit 1, and the testimony of Special Agent Jensen.

7. Exhibit 1 and the testimony of Special Agent Jensen demonstrate Defendant's criminal history to include felony convictions for:

- Theft/receiving stolen property (2001);
- Intimidation (2001);
- Criminal recklessness (2002); and
- Criminal recklessness (2006).

Misdemeanor convictions for:

- Resisting law enforcement (1999);
- Mischief (1999);
- Driving with a suspended license (1999);
- Possession of marijuana (1999); and
- Carrying a handgun without a license (2001).

8. Exhibit 1 further demonstrates that Defendant has failed to appear for court ordered appearances on at least four occasions and has violated the terms of court imposed probation on multiple occasions in the past.

9. The testimony of Special Agent Jensen established that the following facts gave rise to Defendant's 2001 conviction for Intimidation. On June 4, 2000, at approximately 2:00 a.m., Defendant was observed by a law enforcement officer loitering near a private residence located in Greensburg, Indiana. Defendant was intoxicated and had on his person pepper spray and a loaded .22 caliber handgun. Defendant forcibly resisted arrest and threatened the law enforcement officer by stating to him, in sum and substance, that he was going to kill the officer and his family and that he was going to rape and kill the officer's wife and daughter after his release from jail or prison.

10. The testimony of Special Agent Jensen further established that the following facts gave rise to Defendant's 2006 conviction for Criminal recklessness. On January 12, 2004, Defendant crashed his vehicle into a vehicle owed by Rhonda and James Howard that was parked in front of their residence. When Mr. Howard came outside to investigate, Defendant pointed a gun at him and stated to him, "I'm going to kill you." Defendant fled in his vehicle which was found shortly thereafter crashed off the road near the Pine Lake Trailer Court. As law enforcement officers approached the vehicle to investigate, Defendant yelled, "Get the fuck away from my van or I am going to kill you." Immediately thereafter, a shot was fired from the woods toward the van and a law enforcement officer. Defendant fired more shots and continued yelling that he was going to kill the law enforcement officer. The firearm that Defendant used to shoot at the officers was an SKS-style 7.62 x 39mm rifle.

11. Defendant qualifies for a detention hearing upon the government's motion that this case involves a crime of violence. 18 U.S.C. § 3142(f)(1)(A). Although possession of firearms by a convicted felon is not a crime of violence *per se*, this case involves a crime of violence within the definition of 18 U.S.C. § 3156(a)(4) and thus triggers a detention hearing

under 18 U.S.C. § 3142(f)(1)(A). As this Court has previously held, *United States v. Lane*, 252 F.3d 905 (7th Cir. 2001), is not controlling in a case with a dramatically different procedural posture. In *Lane*, the issue was whether the defendant, who had been convicted of the unlawful possession of a firearm by a convicted felon, should have been released pending appeal. Here, the issue is whether Defendant, who has been charged with the unlawful possession of a firearm by a convicted felon, should be released *pending trial*. Moreover, in this case, Defendant—whose criminal history is replete with crimes and threats of violence—was in the possession of multiple stolen firearms. Defendant’s possession of stolen firearms within a very short time of the theft of the firearms from a residence supports an inference that Defendant committed a burglary, which is a crime of violence, to obtain the stolen firearms that he is charged with possessing. In light of his criminal history, Defendant’s possession of firearms posed an immediate and imminent threat of violence and danger. While recognizing the obligation to follow Circuit precedent under the principle of *stare decisis*, *Lane* is not controlling here because it did not address the precise issue presented by this case, *i.e.*, whether the offense of unlawful possession of stolen firearms by a convicted felon may constitute a crime of violence based on the individual facts and circumstances of the particular case. The case specific, facts and circumstances intensive approach taken by the court in *United States v. Dillard*, 214 F.3d 88 (2d Cir. 2000), is applicable here. *See also United States v. Powers*, 2004 WL 1109902 (W.D. Va. April 16, 2004). The Court thus finds the reasoning set forth in *Dillard*—which is consistent with this Court’s reasoning in *United States v. Sloan*, 820 F. Supp. 1133 (S.D. Ind. 1993)—persuasive.

12. Defendant qualifies for a detention hearing upon the government’s motion that

Defendant has previously been convicted of at least two crimes of violence, *i.e.*, Intimidation and Criminal Recklessness. *See* 18 U.S.C. § 3142 (f)(1)(D) & 3156(a)(4).

13. Defendant qualifies for a detention hearing upon the Government's motion that this case involves a serious risk that Defendant will threaten, injure, or intimidate a prospective witness under 18 U.S.C. § 3142(f)(2)(B). Defendant's conduct and criminal history demonstrate a propensity to threaten and/or use physical violence against anybody, including law enforcement officers, who may attempt to confront him and/or control his conduct.

14. The evidence relevant to the factors set forth in 18 U.S.C. § 3142(g) requires that Defendant be detained as there is no condition or combination of conditions of release sufficient to reasonably assure that he will not engage in dangerous criminal activity pending trial. Therefore, Defendant is ORDERED DETAINED.

15. When evaluating the government's motion for pretrial detention, the Court engages a two-step analysis: first, the Court determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *See United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving: (1) a crime of violence; (2) an offense with a maximum punishment of life imprisonment or death; (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more; or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses. *See* 18 U.S.C. § 3142(f)(1). A defendant is eligible for

detention upon motion by the United States or the Court *sua sponte* in cases involving: (5) a serious risk that the person will flee; or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *See* § 3142(f)(2); *United States v. Sloan*, 820 F. Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. *See* 18 U.S.C. §3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. *See also United States v. DeBeir*, 16 F. Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F. Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moved for detention pursuant to 18 U.S.C. §§ 3142(f)(1)(A), (f)(1)(D), and (f)(2)(B). The Court has found that the government satisfied its burden of establishing that all of these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions set forth in Section 3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. *See* 18 U.S.C. § 3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *See United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *See United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3d Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S. Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400,

405-06 (2d Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F. Supp. 591, 596 (N.D. Ind. 1987).

With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S. Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F. Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S. Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant’s appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

16. The Court further considers the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir.

1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

17. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

a. For the reasons set forth *supra*, this case involves a crime of violence.

b. Defendant has had persistent and continuous contacts with law enforcement.

In light of the number and nature of these contacts, Defendant has established a pattern of violence and disregarding the law. He is a persistent offender with a deplorable criminal record. Defendant has violated the terms of court imposed probation on at least four previous occasions. If released, he will not follow the law or the conditions of pre-trial release.

Defendant presents a serious risk to the community.

c. The evidence presented demonstrates a high probability that Defendant will be convicted of the charged offense. Based on the nature and circumstances of the offense and Defendant's criminal history, Defendant is most likely facing a very substantial period of incarceration if he is convicted. Under a best case scenario, Defendant most likely would be in the ten-year range for a period of incarceration. While it was not entirely clear from the information contained in Exhibit 1, it appears that Defendant may qualify for sentencing under the Armed Career Criminal Act and thus possibly face a mandatory minimum 15-year sentence.

The Court having weighed the evidence regarding the factors found in 18 U.S.C. § 3142(g), and based upon the totality of evidence set forth above, concludes that the Defendant clearly and convincingly is a danger to the community.

WHEREFORE, STEVEN SMITH is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with a Court proceeding.

Dated this ____ day of May, 2006.

Kennard P. Foster, Magistrate Judge
United States District Court
Southern District of Indiana

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U. S. Marshal Service